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IN THE
UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

arbitrary and capricious, in excess of statutory authority, and otherwise not in accordance with law. Pursuant to 47 U.S.C. § 402(a), Chapter 158 of Title 28 of the United States Code, 5 U.S.C. § 706, and Fed. R. App. P. 15, Time Warner Entertainment Company, L.P. ("TWE"), therefore now petitions this Court for review.

Venue

Venue in this Court is proper under
28 U.S.C. § 2343.

Petitioner

TWE, a Delaware limited partnership in which Time Warner Inc., a publicly traded Delaware corporation, indirectly holds a majority interest, is comprised principally of three unincorporated divisions: Time Warner Cable, which is the second largest operator of cable-television systems in the United States, operating systems in approximately 1,600 franchise areas throughout the Nation; Home Box Office, which owns and operates pay-television programming services, including the Home Box Office Service and Cinemax; and Warner Bros., which produces and distributes motion pictures and television programs.

Background

On October 5, 1992, Congress enacted the 1992 Cable Act over the President's veto. Section 4 of that Act requires the vast majority of cable systems (those with more than 12 channels) to reserve up to one-third of their channel capacity for local commercial broadcast stations. 47 U.S.C. § 534(b)(1)(B); see also id. § 534(c)(1)(A)-(B). Section 5 provides that most cable systems (those with more than 36 channels) must carry all qualifying local noncommercial educational ("NCE") stations and, in certain cases, import distant signals. Id. § 535(b)(1); §§ 535(b)(2)(B)(i) and (b)(3)(B). Both §§ 4 and 5 require cable operators to carry the signal of a must-carry station in its entirety and on the channel of the station's choice, even if that channel is already occupied by another programmer. Id. §§ 534(b)(3)(A) and (b)(6); §§ 535(g)(1) and (g)(5). Section 6 provides that, starting October 6, 1993, cable systems may no longer retransmit the signal of a commercial station without its consent, unless that station elects to exercise its must-carry rights under § 4. Id. § 325(b)(1). Section 5 does not by its terms call for FCC regulations, but §§ 4 and 6 required the FCC to issue

regulations by April 3, 1993, 47 U.S.C. §§ 534(f),
325(b)(3)(A). 1/

On November 5, 1992, the FCC adopted a notice of proposed rulemaking ("NPRM") concerning §§ 4, 5 and 6. In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992--Broadcast Signal Carriage Issues, MM Docket No. 92-259, 7 FCC Rcd. 8055 (1992); see also Cable Television Services; Must Carry and Retransmission Consent Provisions, 57 Fed. Reg. 56,298 (1992). TWE participated in the ensuing rulemaking proceeding by submitting comments and reply comments. On

1/ Section 4 provides in relevant part:

"Regulations by Commission.--Within 180 days after the date of enactment of this section, the Commission shall, following a rulemaking proceeding, issue regulations implementing the requirements imposed by this section."

47 U.S.C. § 534(f). Section 6 provides in relevant part:

"Within 45 days after the date of enactment of the [1992 Cable Act], the Commission shall commence a rulemaking proceeding to establish regulations to govern the exercise by television broadcast stations of the right to grant retransmission consent under this subsection and of the right to signal carriage under section 614, and such other regulations as are necessary to administer the limitations contained in paragraph (2). . . . Such rulemaking proceeding shall be completed within 180 days after the enactment of the [1992 Cable Act]."

47 U.S.C. § 325(b)(3)(A).

March 19, 1993, the FCC released the Order, a summary of
which was published in the Federal Register on April 2.

- require a cable operator to provide all must-carry signals to all subscribers, even if such subscribers are sophisticated institutions (such as hotels and hospitals) that indicate that they do not wish to receive those signals;
- provide that certain provisions of § 4 apply even to stations that elect retransmission-consent status;
- provide that a cable system and a retransmission-consent elector may not enter into an exclusive agreement;
- provide that, if a commercial station fails to make an election between must-carry and retransmission-consent status, it will acquire must-carry status nonetheless;
- permit stations electing retransmission-consent status to exercise rights under the Commission's syndicated-exclusivity and network-nonduplication rules, whether or not such stations are being carried; and
- provide that a cable system may not retransmit the signal of a superstation without the superstation's consent if the cable operator receives that signal directly by terrestrial microwave.

As more fully explained below, the Order and the regulations are contrary to law, and TWE therefore now requests that the Court review and set aside the Order.

Grounds on Which Relief Is Sought

This Court must set aside the Order on the following grounds:

1. The Order is contrary to TWE's rights under the First 2/ and Fifth Amendments. Must-carry rules force TWE as a cable operator to speak in ways in which it would prefer not to speak, promote broadcasters' speech at the expense of that of TWE, and single out TWE, a member of the press, for especially harsh treatment. Must-carry rules also have the effect of filling up scarce cable channels with broadcast stations, thus depriving TWE as a programmer of channel capacity and the opportunity to engage in speech, and promoting broadcasters' speech at the expense of that of TWE. The First Amendment flaws of the must-carry rules are further aggravated by the channel-positioning rules. Moreover, the must-carry rules require cable operators to

2. The Order is arbitrary and capricious in that it causes must-carry obligations with respect to commercial stations to go into effect as early as June 2, 1993, even though the retransmission-consent rules do not go into effect until October 6, 1993. In this way, the Order will cause twice the amount of disruption necessary: Cable operators will have to disrupt their line-ups on June 2 by adding must-carry-eligible broadcast stations, and again on October 6 by deleting retransmission-consent electors with whom no agreement can be reached. Under any sensible regime, the disruption resulting from the implementation of §§ 4 and 6 of the 1992 Cable Act should be confined to a single day. Even though commenters urged the FCC to adopt such a regime, it refused to do so, mistakenly saying that it lacked authority to postpone the effective date of the must-carry rules until October 6. The Order is therefore irrational and, in any event, fails adequately to explain its result. Accordingly, this Court must set aside the Order pursuant to 5 U.S.C. § 706(2)(A) as arbitrary and capricious.

injunctive relief. Over Circuit Judge Williams's dissent, a specially convened three-judge panel upheld these provisions, and entered summary judgment for the defendants. Turner Broadcasting System, Inc. v. FCC, 61 U.S.L.W. 2621 (D.D.C. April 8, 1993). Appeals from the District Court's decision were filed in the Supreme Court on May 3, 1993.

3. The Order is arbitrary and capricious in that it causes must-carry obligations to go into effect on June 2, but does not require must-carry electors to specify the channel on which they wish to be carried after October 6 until June 17. Because, under the channel-positioning rules, commercial stations have four different options, it is impossible for a cable system accurately to predict on which channel a station may wish to be carried after October 6. Thus, it is inevitable that there will be instances in which cable systems must disrupt their line-up on June 2 by adding a must-carry-eligible broadcast station, and again on October 6 by moving the same station to a different channel. The Order is therefore irrational and, in any event, fails adequately to explain its result. Accordingly, this Court must set aside the Order pursuant to 5 U.S.C. § 706(2)(A) as arbitrary and capricious.

4. The Order is arbitrary and capricious in that, in addition to June 2 and October 6, it arguably creates a third disruption date (or, rather, series of disruption dates) between June 2 and October 6 by allowing stations to become must-carry eligible by (a) seeking and obtaining an ADI adjustment; (b) offering to reimburse a cable system for increased copyright liability; or (c) by enhancing the quality of their signal, and by failing to set any deadline

by which stations must do so. The Order is therefore irrational and, in any event, fails adequately to explain its result. Accordingly, this Court must set aside the Order pursuant to 5 U.S.C. § 706(2)(A) as arbitrary and capricious. 4/

5. The Order is arbitrary and capricious in that it allows commercial stations to insist on being carried on a channel that is outside what is currently a cable system's basic tier. Carriage outside that basic tier in most cases imposes significant hardships on cable systems and in some cases may, as a practical matter, be impossible. The Order is therefore irrational and, in any event, does not adequately explain its result. Accordingly, this Court must set aside the Order pursuant to 5 U.S.C. § 706(2)(A) as arbitrary and capricious.

6. The Order is arbitrary and capricious in that the FCC refused to create priority rules for channel positioning. Under the rules, commercial stations are entitled to four different channel-positioning options, and

4/ Any disruption resulting from implementation of §§ 4 and 6 comes in addition to disruption that has already resulted from implementation of § 5. The obligations imposed by that section became effective on December 4, 1992, *see supra* fn.1, and cable operators have already been required to disrupt their channel line-ups by adding qualifying NCE stations. This fact obviously heightens the need for minimizing further disruption.

it is therefore inevitable that, in certain instances, commercial stations will stake conflicting claims to channel positions. Such conflicting claims will inevitably lead to more uncertainty, disruption, and confusion. The Order is therefore irrational and, in any event, fails adequately to explain its result. Accordingly, this Court must set aside the Order pursuant to 5 U.S.C. § 706(2)(A) as arbitrary and capricious.

7. The Order is arbitrary and capricious in that it defines the term "substantial duplication" (as used in § 534(b)(5)) in a way that is inconsistent with the FCC's

their cable system that they do not wish to receive all must-carry stations. ^{5/} The Order states that the Commission is without authority to create an exemption for such institutions, which is mistaken as a matter of law. Thus, the Order is irrational and, in any event, fails adequately to explain its result. Accordingly, this Court must set aside the Order pursuant to 5 U.S.C. § 706(2)(A) as arbitrary and capricious or otherwise not in accordance with law.

9. The Order is arbitrary and capricious, in excess of statutory authority, or otherwise not in accordance with law in that it provides that retransmission-consent electors are entitled to certain privileges pursuant to § 4, including the right to insist on carriage of their entire signal. This is directly at odds with § 6, which provides that "the provisions of section [4] shall not apply" to retransmission-consent electors. Thus, the Order is irrational and, in any event, fails adequately to explain its result. Accordingly, this Court must set aside the Order pursuant to 5 U.S.C. § 706(2)(A), (2)(C), or both, as

^{5/} Indeed, not only do the FCC rules interpreting §§ 4 and 5 require a cable operator to provide all must-carry signals to all basic-tier subscribers, FCC rules interpreting § 3 require a cable operator to sell the basic tier to all subscribers. See 47 C.F.R. § 76.920.

being in excess of statutory authority, arbitrary and capricious, or otherwise not in accordance with law.

10. The Order is in excess of statutory authority, arbitrary and capricious, or otherwise not in accordance with law in that it prohibits a cable system from entering into an exclusive carriage agreement with a retransmission-consent elector. Neither § 6 nor any other statute gives the Commission authority to prohibit such agreements. Moreover, the Order is irrational and, in any event, fails adequately to explain its result. Accordingly, this Court must set aside the Order pursuant to 5 U.S.C. § 706(2)(A), (2)(C), or both, as being in excess of statutory authority, arbitrary and capricious, or otherwise not in accordance with law.

11. The Order is contrary to constitutional right and arbitrary and capricious in that it provides that

not be retransmission-consent status, with the station being
deared to have given consent Accordingly this Court must

carriage. Section 6 provides that the retransmission-consent requirement does not apply to the signal of a superstation "if such signal was obtained from a satellite carrier". By using the passive voice, the statute makes clear that it does not require that a particular cable system obtain the superstation's signal from a satellite carrier, so long as any cable system obtains the signal from a satellite carrier. The Order leads to the absurd result that, to be able to retransmit a superstation, some cable systems will have to switch from microwave to satellite reception. The Order is therefore irrational and, in any event, fails adequately to explain its result. Accordingly, this Court must set aside the Order pursuant to 5 U.S.C. § 706(2)(A) as arbitrary and capricious and otherwise not in accordance with law.

Conclusion

For the foregoing reasons, this Court must set aside the Order.

WHEREFORE, TWE, being aggrieved by and suffering injury as a result of the Order, respectfully requests that this Court set aside the Order and grant such other and further relief as may be just and proper.

Respectfully submitted,

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